U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 08Aug2002

Case No. 2001-LHC-2901

OWCP No. 06-180968

In the Matter of:

Karleshia A. Ortiz,
Claimant,

v.

Intermarine USA,
Employer,

and

American Longshore Mutual Association, Ltd.
Carrier,

and

Director, Office of Workers' Compensation Programs,
Party-in-interest.

Appearances:
Lori A. Carter, Esq., for Claimant
G. Mason White, Esq., for Employer

Before:
RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for temporary partial disability, temporary total disability, permanent partial disability, and coverage of all psychiatric treatment from an injury alleged to have been suffered by Claimant, Karleshia A. Ortiz, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 948(a). (Hereinafter "the Act"). It is undisputed that Claimant was injured by being exposed to a loud noise when cleaning a fuel tank while employed by Employer and that as a result she is suffering from hearing loss in her right ear.

Claimant also alleges, however, that she is experiencing various other injuries as a result of this accident, including neck pain, "head pain,"[1] and psychiatric injuries. Employer disputes that these conditions are related to Claimant's work-related accident.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on January 17, 2002. (TR).[2] Claimant submitted fourteen exhibits, identified as CX 1 through CX 14, which were admitted without objection (TR. at 8, 79, 86). Employer submitted eight exhibits, EX 1 through EX 8, which were admitted without objection (TR. at 9). The record was held open for a post hearing deposition, the submission of pay records, and post-hearing briefs.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent. Issues discussed in this decision will be limited to those raised at the hearing.

ISSUES

The following issues are disputed by the parties:

1. Whether the Claimant is entitled to additional permanent partial, temporary total or partial benefits due to the hearing loss in the right ear?
2. Whether the Claimant sustained a compensable neck injury resulting from the 1999 work accident?
3. Whether the Claimant sustained any compensable head injury resulting from the August 18, 1999, work accident?
4. Whether the Claimant sustained a compensable psychiatric injury resulting from the August 18, 1999 work accident which entitles the Claimant to medical and/or income benefits?

STIPULATIONS

At the hearing, Claimant and Employer stipulated that:

1. The Longshore and Harbor Workers' Compensation Act applies.

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[1] Claimant testified:

> I mean, the – they say it's headaches, but I don't see how they are headaches. I call them head – I call them head pains, because I know what a headache is and I know this headache pain – the head pain, because it's totally different. ... It's not a headache, because, it wouldn't be staying in the same spot all the time and it wouldn't be lingering on so long, this long of a period of time.

(TR. at 70-71).

[2] EX - Employer's exhibit; CX- Claimant's exhibit; and TR - Transcript.

2. An employee and employer relationship exists.
3. Claimant sustained a compensable work-related injury on August 18, 1999,to the extent of a hearing injury.[3]
4. The Claimant's average weekly wage at the time of the injury was $300.62 per week, with the corresponding compensation rate of $217.94.
5. Authorized treating physicians, are Dr. Joel Greenberg and Robert Logan.
6. Claimant suffered a permanent hearing loss as a result of the August 18, 1999 compensable work-related injury.
7. The Employer/ Insurer paid the Claimant $8,020.19 on January 10, 2002 in permanent partial disability benefits based on Dr. Logan's January 12, 2001 report of a 18.4% binaural hearing impairment.
8. Employer/ Carrier paid to Claimant temporary total disability benefits in the amount of $1,027.41 for the initial time Claimant lost from her employment, August 19 through September 22, 1999.

(TR. at 9-10, 14-15).

DISCUSSION OF LAW AND FACTS

Claimant began working for Employer on June 21, 1999. She was required to take preemployment health screening tests, including a hearing examination. (TR. at 21). It is undisputed that, at this time, Claimant's hearing test was normal. (TR. at 22-23). Initially she was hired to clean yachts, later she was "hired on as a pipefitter." (TR. at 24). As a pipefitter Claimant learned how to cut and fit pipes. The job also included cleaning out fuel tanks. Claimant testified that this entailed "making sure all the trash and everything is out of there, just wiping it down, cleaning everything, getting it inspected and having somebody go down there." (TR. at 24). A fuel tank is stainless steel or aluminum, with four sections which are connected by oval shaped holes. Claimant estimated that the tank is around five feet six inches tall, and not even an arm's distance away on both sides. It is totally enclosed and you have to crawl in and out of the entryway. (TR. at 25-27).

On August 18, 1999, Claimant was cleaning out a fuel tank. (TR. at 29). She testified that before she went down in the tank, she got a "safety guy" to go get the tanks lifted out and make sure she could safely go inside. (*Id.*). The tank was cleared and she went down with clean water to wipe the tank down and clean out all of the trash. (TR. at 29-30). She was still in the tank, in the second of four sections, when she heard a loud blast. She testified:

> When the loud – loudness came in there, it was so loud, like a cannon going off. It startled me so that I was scared. I mean, it caused me to cry, but I didn't want to do that in front of the guys and everything. You know how the guy thing is. ... And I finally climbed out of the hole and the hole watchman wasn't there. There was nobody there. And when I climbed out and everything, I lost my balance. My head was spinning and that's when they took me down to the – I guess, the infirmary at the plant and I complained that my head was hurting me real bad and

[3] At the hearing, Claimant's counsel stated, "This stipulation is not limited. In other words, it's our contention that she incurred more damages now, but that is the only stipulation that they would go for. I want to make that clear, that I was limiting my agreement." (TR. at 9-10).

my ear was hurting me. And they took me down to the infirmary.

(TR. at 30-31). Claimant was taken to Industrial Healthcare Management. *See generally* (EX2) (records of Industrial Healthcare Management). Again, Employer concedes that there was a loud noise caused by a rubber blank between two flanges bursting. (TR. at 32-33); (CX 6). At the time of this accident, Claimant was also working at the Waffle House as a waitress. (TR. at 101-103).

It is undisputed that the incident described above resulted in a hearing loss in Claimant's right ear. (TR. at 14-15). Claimant further contends that this accident at work resulted in: "'dizziness,' 'pass[ing] out,' 'continuous and severe head pains,' 'neck pains,' 'vomiting,' 'nausea,' ear 'bleeding,' severe 'depression,' 'anxiety,' 'sleep problems' and extreme sensitivity to 'light' and 'noises' of all kinds." (Cl. Br. at 3). Claimant admits that she has had problems with her right ear since she was born, has had an one previous operation that ear, and had bleeding in the right ear when she was a child. (TR. at 97).

Claimant seeks compensation for her hearing loss, "head pain," and psychiatric problems. (Cl. Br. at 9). Claimant was out of work from the time of the accident until September 22, 1999. (TR. at 15); (CX 11 at 1); (Cl. Br. at 5). She then returned to work within her restrictions, although she maintains that she had to miss certain days from work even after returning due to her injuries. (TR. at 104). On March 10, 2000 Claimant was sent home from work. (TR. at 54-55). On that date, Claimant attempted suicide. (TR. at 57). Alcohol and THC (marijuana) were found in her blood on that date. (CX 1K at 4). Finally, it is uncontested that on June 26, 2000, Claimant was terminated for unacceptable behavior and presenting an unprofessional image of the company. (TR. at 114-115). Since that time, Claimant has been able to secure various other employment as a waitress, telemarketing, and delivering auto parts. (TR. at 122-126). Between December 2001 and the date of the hearing, Claimant was out of work. (TR. at 126).

Claimant's undisputed hearing loss has been established to be 18.4 %[4], and Claimant has been paid that rating according to the schedule. (CX1B at 46); (TR. at 14). Employer has also paid Claimant temporary total disability in the amount of $1,027.41, for the initial time lost after the accident, August 19, 1999 through September 22, 1999. (TR. at 15);(CX11 at 1);(Cl. Br. at 5). Claimant asserts that this figure is $128.91 less than the amount due for this time period. (Cl. Br. at 5). In addition to the right ear injury, Claimant contends that she sustained head, neck and psychiatric injuries as a result of the accident. Therefore, she maintains that her medical expenses

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[4] When asked what percent of hearing loss Claimant was seeking, counsel replied:

> I am not qualified in determining it. There are the AMA guidelines. There was a preemployment test and there was a – which showed normal hearing, and there was the hearing test afterwards, so the numbers are there, but I would need to get a physician's interpretation of it. My understanding is that Dr. Logan sat down with Cheryl Mathis who is a representative of the insurance company, because Dr. Logan didn't know how to do it either. ... But the figures are there, and it just has to be followed through the guidelines.

(TR. at 13). As Claimant did not submit any evidence of alternate hearing loss percentage or interpretation of the audiograms before, during or after the hearing, it is assumed that his rating is uncontested. As discussed *infra*, it is the Claimant's burden to establish the extent of loss due to any injury.

for these injuries should also be covered in their entirety. Claimant also alleges that she is entitled to temporary partial disability after she returned to light duty work for Employer, as she states that she was unable to work for a total of 296.5 hours as a result of her injuries. She claims this entitles her to temporary partial disability in the amount of $1,587.27. Finally, Claimant asserts that she was not paid for all of her mileage expenses relating to this claim. (Cl. Br. at 6).

Medical Evidence

Industrial Healthcare Management

Claimant was seen at Industrial Healthcare Management on August 18, 1999, after her accident at work. (EX 2 at 1). She was released to return to work without restrictions on August 23, 1999, although it was noted that her medications caused drowsiness. (EX 2 at 3). She returned on the 19th, the 23rd and 25th, and remained out of work during that time. (EX 2 at 3-9). When Claimant returned on September 3, 1999, it was noted that Claimant saw Dr. Danello. His impressions at this time were "post traumatic cephalgia, noise exposure" and she was referred to Dr. Leone on September 9, 1999. Her work status was noted as "modified or light duty for 7 days. No lifting over 15 pounds. No climbing." (EX 2 at 11). She returned on September 7, 1999. The impression was "cephalgia, barotrauma to ear- follow up." At this time her status was "modified or light duty. No lifting over 15 pounds. Limied [sic] use of noise > 50 dB exposure." (CX 2 at 14). She again returned on September 21, 1999, and saw Dr. Assorgi. (EX 2 at 17). His impression was cephalgia and she was allowed to return to work without restriction. (*Id*.). The notes state "Patient has seen Neurologist and states she wants to return." (*Id*.). In a letter dated September 30, 1999, it was noted that Claimant returned to the office on September 28, 1999 for a recheck. (EX 2 at 20). Dr. Assorgi issued the following work restrictions: "Light/ Modified duty for 10 days. No bending or stooping. No climbing. No operating heavy equipment/ vehicles. Other restrictions: avoid very loud noises." (*Id*.).

Dr. Kenneth V. Leone

Dr. Leone is a board certified neurologist who is affiliated with the Neurological Institute of Savannah. *See* (EX 8 at 5-6)(discussing Dr. Leone's educational and professional achievements). Claimant was first examined by Dr. Leone on September 9, 1999 for persistent right temporal headaches. (EX 8 at 6). Dr. Leone requested a CT head scan for Claimant, and that was performed on September 9, 1999 and was normal. (CX 1E at 2); (EX4 at 1). Dr. Leone noted: "[Claimant] has developed a syndrome of transformed migraine since the episode of August 18th...". (CX 1E at 3); (EX4 at 2). On October 13, 1999 Dr. Leone noted that Claimant was doing better in terms of her headaches, due to the medication, Buspar. (CX 1E at 5);(EX4 at 3). At this time he informed her that no formal follow-up was necessary, although she could follow up as needed. (EX 8 at 13).

On December 13, 1999, Claimant saw Dr. Leone again. At this time the doctor noted how well she was doing on Buspar, noting "[a]mazingly, the Buspar produced resolution in her right-sided headaches associated with nausea. Last week she ran out of the Buspar and there was a delay in picking up the prescription. After being off of it for a few days, the headaches and nausea returned. She is now back on the Buspar and headache-free." (CX 1E at 6); (EX4 at 4). At this time Claimant not only stated that she was headache-free, she also denied any neurological symptoms other than hearing loss. (*Id*.).

On January 27, 2000, Claimant returned to Dr. Leone due to "a severe, right-sided throbbing headache associated with nausea and vomiting. She cannot identify anything which might have precipitated this headache. In addition, today she noted some blood coming from her right ear." (CX 1E at 7); (EX4 at 5). He wrote:

> Her current episode is consistent with an isolated episode of migraine without aura, and I do not believe that it is related to the incident which happened to her at work in August 1999.

(*Id*.). *See also* (EX 8 at 15). Claimant returned on March 6, 2000. (CX 1E at 8);(EX4 at 6). At that time she reported that the medicine given to her on the previous visit helped initially, however the migraine lingered. She also reported that she had again developed the recurrent pattern of mild right-side headaches. (*Id.*). Dr. Leone changed Claimant's medication. (*Id*.). Finally, in a letter dated March 14, 2000, Dr. Leone wrote:

> Today [Claimant] returned for follow-up of her headaches. Since I saw her last week, she began taking the Desipramine, but was unable to tolerate the way she felt on it. She called us Friday, and we instructed her to try taking half a tablet daily instead of a full tablet. Later that day, she developed a recurrence of her bothersome right-side throbbing headache associated with nausea, and she slit her wrists. She was evaluated at St. Joseph's ER and eventually transferred to the service of Dr. Farrar at the Clark Center at Memorial. At St. Joseph's, her alcohol level was elevated at 145 and her urine drug screen was positive for THC and barbiturates, but the patient had been using Esgic. She is now not on any medications. She denies that she has any significant stress in her life aside from the recurring headache or "head pain" as she calls it, although she did mention some sort of stress about her daughter and about missing work frequently. She is tearful in the office today, but I did have a long talk with her regarding my additional thoughts regarding her headache disorder...I believe that headaches are just one part of a larger problem with anxiety and depression in this patient, and I believe she needs continued follow-up from a psychiatric standpoint as well.

(CX 1E at 9); (EX4 at 9).

In addition to these notes and letters, Dr. Leone also gave a deposition on April 9, 2001. (EX 8). In this deposition Dr. Leone stated that Claimant did not, at any time in his treatment of her, have any complaint of neck pain. *See* (8-9; 13; 16). When asked "if [Claimant] had suffered some sort of cervical strain as a result of this incident in August of '99 would you have expected her to make some sort of complaint to you of neck pain during these visits that she saw you?;" Dr. Leone replied, "Yes." (EX 8 at 16).

Dr. Leone was also asked about Claimant's recurrent headaches. When asked: "Can you say with any reasonable degree of medical certainty that the headaches [Claimant] was experiencing on 03-06-00 were related to her work injury she had in August of 1999?," Dr. Leone replied: "I don't know. It would be unusual for her to have headaches in March of 2000, after a period of resolution of the headaches, for them to be related to the incident in August of 1999...That's, I think, the best way for me to word that... Because it was the same type of headache in a milder form." (EX 8 at 17). He agreed, however, that when he saw her in January

of 2000, he did not think her problems at that point were related to the accident. (*Id*.). When asked: "In your opinion, Doctor, were [Claimant's] problems you saw her for on March the 14th of 2000 related to her work injury in August of the preceding year?," Dr. Leone replied "No, not entirely. I felt that in light of the suicide gesture, that there had to be something much more significant in terms of stress to be going on to trigger that kind of response, and I questioned her about that...She told me that there was some stress in her family life regarding her daughter, and also she was experiencing stress about missing work frequently." (EX 8 at 19-20). When asked, Dr. Leone stated "[i]ntermittent flareups of her headache might cause her to miss work, but, again, I cannot definitively state that those flareups were directly related to the August 1999 work incident." (EX 8 at 20).

Dr. J. Robert Logan

Claimant was first seen by Dr. Logan on October 7, 1999. At that time Dr. Logan ordered a hearing test. (EX 1 at 2); (CX 1B at 6-7). The results of that hearing exam, performed on October 14, 1999 were "normal hearing sensitivity in the left ear and a mild to moderate conductive hearing loss in the right ear. Impedance findings also suggest the presence of conductive pathology." (EX 1 at 5); (CX 1B at 10). Following this exam, in November of 1999, Dr. Logan noted the "significant" change in the hearing in Claimant's right ear since her preemployment testing. (EX 1 at 6)(dated November 1, 1999); (CX 1B at 11). He wrote "In light of the fact that most of her symptomatology has developed since the August 18th accident, one would have to certainly indicate that there is a strong possibility that there is a cause and effect relationship between the accident and the hearing loss." (*Id*.).

Claimant returned to Dr. Logan on April 6, 2000. At that time she was complaining of "a ringing noise and clogged up feeling in her right ear." (EX 1 at 7); (CX 1B at 13). Dr. Logan ordered additional audiometric studies. Based upon these studies, Dr. Logan notes that Claimant's hearing had decreased from October to April. (EX 1 at 12); (CX 1B at 11, 18). Dr. Logan also ordered an "ENG," electronystagmography testing, which was performed on May 1, 2000. (EX 1 at 22);(CX 1B at 27-28). Based upon this study Dr. Logan noted abnormal responses "consistent with the findings of prior mastoid surgery on the right side and the possibility of a concussive type injury to the right ear as a result of the accident that occurred back in August of 1999." (EX 1 at 22)(CX 1B at 28). Claimant was put on light duty with no exposure to noise or to intense pressure changes while at work. Medication was prescribed. Dr. Logan noted that the other possibility was "some form of a temporal arteritis secondary to the head injury that occurred from this significant pressure change and explosive reaction back in August of 1999. (EX 1 at 22)(CX 1B at 28). Following this test Claimant returned complaining of bleeding in the right ear that lasted approximately 3 days and then stopped, headaches and nausea. (EX 1 at 23); (CX 1B at 30).

On July 17, 2000, Dr. Logan recommended a hearing aid evaluation for the right ear. When asked for a rating, Dr. Logan explained that he did not have a guide but he "would call this a non-functioning ear as far as air conduction and a moderate sensorineural hearing loss as far as the nerve is concerned." (EX 1 at 28); (CX 1B at 40). As of December 5, 2000, Claimant was still complaining of right temporal pain. Dr. Logan states "[m]y recommendations at this point are that she follow through with Dr. Greenberg to see if she can get some help, because I cannot identify any otologic origin at this point, although she does say that when she wears the hearing aid for any length of time she does experience a good deal of increase in this headache. (EX 1 at

31)(CX 1B at 45).

Finally, in an office note dated January 12, 2001, Dr. Logan assigned a rating to Claimant's hearing loss. He writes:

> I met with Ms. Cheryl Mathis today, and we used the AMA guide for permanent impairment. We went, according to their instructions, and calculated the 500, 1,000, 2,000 and 3,000 in each ear. We found that in the right ear, which is the most affected ear, she has an 80.6% score. In the left ear she has a 0% score. You add these together and go the appropriate table 11-2. She comes up with an impairment of 13.4%, and because she has tinnitus, you add 5% to that giving us a total impairment of 18.4% for binaural hearing impairment. For whole body impairment she has a 6%, and this is calculated from table 11-3.

(EX 1 at 32); (CX 1B at 46). Claimant returned to Dr. Logan on February 16, 2001 complaining of recurring episodes of vertigo with associated nausea. He states "They are associated with increase in tinnitus as well as some changing in her hearing." He prescribed Valium. (EX 1 at 33); (CX 1B at 47); (EX 1 at 36)(CX 1B at 49)(note dated July 5, 2001, Claimant returning for a resumption of vertigo). On December 6, 2001, Claimant returned with bleeding in her right ear. The diagnosis at that time was: Otitis media, chronic, conductive hearing loss, right ear, and bullous hemorrhagicus of the right external ear canal. (EX 1 at 37); (CX 1B at 50).

St. Joseph's/ Candler Health System

On March 10, 2000, Claimant was taken by ambulance to the emergency room. She was "in intense emotional distress, crying and complaining of a headache which is unrelenting bilateral pre- frontal, sharp in nature." (CX 1K at 3). The diagnosis was "[a]cute psychiatric depressive episode with self inflicted lacerations." (CX 1K at 5). It was noted that Claimant's blood alcohol level was elevated and THC was noted in her drug screen. (CX 1K at 4). The mobile assessment psychological team was consulted and Claimant was interviewed. *See generally* (CX 1J)(comprehensive assessment used in the ER to refer Claimant for further psychiatric care). Claimant was then transferred to the Clark Center. (CX 1K at 4; 13). Claimant later returned to this emergency room on May 25, 2000. At that time her diagnosis was anxiety/ depression and palpitations. (CX 1K at 16-17). Claimant again returned on October 16, 2001 for a severe headache in her right temple. Her diagnosis was "acute cephalgia." (CX 1K at 30).

Memorial Health University Medical Center–Clark Center.

Claimant was admitted from ER after suicide attempt on March 10, 2000. (CX 1L at 2-4). The assessment was status post suicide attempt with marked depressive features and a history of chronic bitemporal head pain secondary to accident at her job. (*Id*. at 4). She was admitted to the Clark Center for "continuing evaluation, treatment and stabilization as per psychiatry." (*Id*. at 4). The next day, Claimant was evaluated. Under impressions, the following axises were listed: Axis I was: "Adult situational disorder with depressed mood. Also, dysthymia, rule out major depression. Also, panic disorder, also history of alcohol abuse or dependence and history of other polysubstance abuse."; Axis II was: "mixed feature with borderline features predominantly with antisocial features."; Axis III was: "right-sided head pain secondary to trauma." (*Id*. at 6-7). *See also* (*Id*. at 5-7) (reviewing Claimant's history and symptoms). Claimant was discharged on

March 12, 2000. (*Id*. at 9-10).

Dr. Robert S. Balsley

Dr. Balsley first saw Claimant on March 15, 2000. (CX 1D at 4). She was seen on this date in order to assess her fitness to return to either light duty work or her regular job following her suicide attempt on March 10, 2000. (*Id*.). Dr. Balsley made the following diagnosis: complete loss of hearing of right ear by history, recent depressive episode with suicide attempt, and temporal headache, possibly migraine headache. On that date he noted that she could return to work, on light duty for the next week. (*Id*.). His diagnosis/ assessment was listed as headaches, and he noted that she was allowed to return to regular duties on March 27, 2000. (*Id*. at 5). Claimant was also referred back to Dr. Logan. (*Id*.). On March 27, 2000, Claimant returned to Dr. Balsley. At this time she was complaining of pain in the right temporal area. Dr. Balsley returned her to light duty, and refilled her Esgic. (*Id*. at 6). On April 7, 2000, Claimant again returned, complaining that her headaches were becoming more frequent. (*Id*. at 8). Dr. Balsley's assessment at this time was "possible migraine headaches, although the history is somewhat disjointed." (*Id*.). He allowed Claimant to return to her regular job, although recommended avoiding entering enclosed places and tanks. (*Id*.). On April 19, 2000, Dr. Balsley again saw Claimant. His impressions were: headaches, questionable etiology; probably intermittent depression; hearing loss right ear. He noted that he was going to allow her to return to her regular job the next day. (*Id*. at 10). On May 3, 2000 his impressions were: headaches with improvement, hearing loss right ear, intermittent depression. At this time Dr. Balsley stated that Claimant could continue the light duty with the security force per Dr. Logan's instructions. (*Id*. at 14). On June 24, 2000, Dr. Balsley noted that he and Dr. Logan agreed that "it may be helpful to try to gradually move [Claimant] back to her job as a pipefitter as long as she is not exposed to extreme noises and extreme heights." He notes that Claimant has less headaches and no vomiting, as on previous occasions. Claimant was reporting some episodes of dizziness however. (*Id*. at 18).

Dr. Joel Greenberg

Dr. Greenberg first saw Claimant on September 22, 2000. (CX 1F at 7). In that initial visit, Dr. Greenberg's impressions were as follows:

1. Common migraine (migraine without aura).
   Certainly a large number of headaches described by this patient is migrainous in nature, and I agree with Dr. Leone's assessment. ....

2. Right cervical/ periscapular muscle spasm
   This may very well be contributing to her pain. The mechanism is unclear, although she thinks it is because she has to turn her head to hear with her left ear. I am somewhat skeptical of that mechanism.

(CX1 F at 7). Dr. Greenberg also noted Claimant's hearing loss and depression but deferred to Dr. Logan and Dr. Sapp on those issues. (*Id*.).

In a letter dated November 11, 2000, Dr. Greenberg writes:

> [Claimant] was examined by me on September 22, 2000 and was found to be suffering from migraines which are aggravated by right cervical and periscapular muscle spasms. The muscle spasms are apparently a result of the accident that occurred on August 19, 1999. They occurred when [Claimant] was subject to an unexpected loud noise which caused her to reflexively jerk her head, causing a whiplash type reaction.

(CX 1F at 13);(EX 5-7). *See also* (CX 1F at 7)(Dr. Greenberg's office note from this date). A radiological report dated November 28, 2000 noted chronic degenerative disk disease, not noted in 1990, and muscle spasm. (CX 1 F at 15). In a second letter dated November 29, 2000, Dr. Greenberg writes:

> [Claimant] is being seen in this office for neurologic evaluation of headaches and neck pain. These symptoms apparently originated from an incident that occurred while she was working on August 19, 1999.

(CX 1F at 17);(EX 5 at 11). At this time Dr. Greenberg noted that Claimant was not able to work. *Id.* Claimant underwent trigger point injections in order to relieve her muscle spasms. (CX 1F at 18).

On February 8, 2001, Claimant returned for a follow up visit. Dr. Greenberg's impressions were: significant improvement in neck pain and trigger points; improvement in headaches; intermittent migraine. (CX1F at 20). Dr. Greenberg made many recommendations, which included:

> 4. I think the patient can return to work from a neurological standpoint. I have not placed any restrictions upon her as a pipe fitter, but I do expect the patient and the employer to use some common sense. She has not worked for many months, and she is going to have to gradually return to her previous level of function. ...
>
> 5. I have explained to the case manager that she does not need physical therapy right now, but I could not exclude the possibility that some additional therapy might be needed in the future.
>
> 6. I have tried to explain to both the patient and the case manager that this patient has both her myofascial pain related to the injury and a history of migraine. These problems will tend to exacerbate each other and they are not wholly separable, but all of her headaches at this point do not simply relate to her injury.

(*Id*. at 21).

On October 25, 2001, Claimant returned complaining of severe right-side pain. Dr. Greenberg's recommendations were as follows:

> 1. I had a discussion with the patient that it seems very counter-productive at this point to start assessing blame for why she has the headaches. I explained to her that migrainous headaches can return and that once the pattern had started, she is likely to get recurrences. The fact that she never had them before the accident, really doesn't change things.
> ...
>
> 4. I am going to obtain an MRI of the brain and an MRI of the cervical spine, because of the persistence of headaches and her limited neck motion so that we can answer the question once and for all, as to whether there is a structural trigger here or not.

(CX1F at 23-24). That MRI was never performed because it was not approved. (CX1F at 27-28).

Gateway Community Service Board

On September 9, 2000, Claimant was assessed by Gateway Community Service Board. In an Individualized Service Plan, Claimant's short term goal was "Gain some functional coping skills to aid in dealing ..family problem/ stress. (CX 1H at 28). The problem list was: "Inability to cope/ function within normal limits ...Depressed meds, anxiety attacks and family problems." (*Id*.). *See also* (*Id*. at 34) (discussing Claimant's appointment on October 17, 2000 and her fixation on her court date and turbulent home life). Dr. Sapp was Claimant's doctor at Gateway.

In a letter dated October 24, 2000, Dr. Timothy Sapp wrote a letter stating that "at this time, because of her condition not being entirely stable, [Claimant] is unable to work." (CX1H at 35). In a subsequent letter, dated December 7, 2001, Dr. Timothy Sapp wrote:

> I began treating [Claimant] on September 14, 2000; and subsequently saw her monthly until July 17, 2001. On initial presentation she described herself as having had severe depressive and anxiety related symptoms following an injury that had occurred at a previous job approximately 1 (one) year prior. Apparently this injury had damaged her hearing and made it difficult for her to pursue work secondary to problems resulting from the injury. The symptoms she present with had been worsening over the course of months and included depressed mood, crying spells, sleep and appetite disturbance, anhedonia, decreased motivation, increased irritability and anxiety. These symptoms did seem to be directly related to the injury and the circumstances that followed. Trials of medications were given to better manage her depression and anxiety and in time some progress was made. Once she was stabilized on a certain medication regimen her case was transferred to her primary care doctor who has continued this treatment. It is imperative that she continue with treatment and that whatever stressors she is still dealing with be resolved as best they can otherwise she could easily decompensate back to the state she first presented in.

(*Id*. at 52).

Medical University of South Carolina

Employer forwarded information to the Medical University of South Carolina in order to get a second opinion from Dr. Gordon Teichner[5] and Dr. Mark T. Wagner[6] regarding Claimant's psychiatric injuries. (EX 7). *See also* (EX 7 at 1)(listing the various records and depositions reviewed in order to reach the opinion stated). In addition to the medical information provided by Employer, the doctors also administered a battery of tests on Claimant. (*Id*. at 4-5). The doctors reached the following diagnostic impressions:

> 1) Major Depressive Disorder, recurrent
> 2) Possible Personality Disorder with Borderline Features
> 3) History of Alcohol Abuse
> 4) Anxiety Disorder Not Otherwise Specified
> 5) Intact Cognitive Function with Average to Low Average Intelligence.

(*Id*. at 5). "As per her report, situational factors (i.e., financial stress, discord with her boyfriend, worker's compensation case, litigation, problems with her children) have exacerbated her psychiatric symptoms." (*Id.*). In addition, the Employer had forwarded specific questions to be answered by this evaluation. The doctors' responses were as follows:

> 1) **Do you feel the claimant is able to return to work?** Yes, the patient is fully capable of employment. Limitations include requiring time off for medical visits as needed. Given her "spells" it would be advised that she is not placed in any situation where she may be injured such as climbing a ladder until she rules out for an organic cause of syncope such as seizures, etc.
> 2) **Do you feel that her current psychiatric problems are an aggravation to preexisting psychiatric problems?** No. Loss of income, situational stress, frustration about future employment and pending litigation are stressors. Her reaction to these stressors is not significantly different than would be expected from any other person.
> 3) **Are her current psychiatric problems directly related to her accident of August 19, 1999?** No. The patient was able to work from the time of the incident until being terminated secondary to behavioral problems in June, 2000. Over that period she was able to hold two jobs. Thus, it is unlikely that current psychiatric problems are directly related to this incident.

(*Id*. at 6).

Section 20(a) Presumption

Section 20(a) of the Act provides claimant with a presumption that her condition is causally related to her employment if she shows that she suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or

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[5] Dr. Teichner is a licensed Clinical Psychologist and a postdoctoral fellow in neuropsychology. (EX 7-6).

[6] Dr. Wagner is a Clinical Neuropsychologist, associate professor of Neurology and an associate professor of psychiatry and behavioral sciences. (EX 7-6).

accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the § 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom, Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS (5th Cir. 1982). Once claimant has invoked the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935).

In the instant case, Claimant has claimed injuries to her ear, neck, and head, as well as psychiatric injuries. Each of these injuries, therefore, must be treated separately although they stem from the same August 18, 1999 work related accident.[7]

Prima Facie Claim

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). To rebut the presumption in the Eleventh Circuit, in which this claim arises, the party opposing entitlement must present substantial evidence ruling out the possibility of a causal connection between the accident and the injury. *Brown v. Jacksonville Shipyards, Inc*., 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley v. Department of the Army/NAF*, 34 BRBS 39 (2000). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1981); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995). In the instant case the parties have stipulated that a work related accident occurred on August 18, 1999. *See* (Stip. 3 & 6); (TR. at 9-10). Therefore, the second element needed to invoke the presumption is not in dispute and Claimant need only prove that she sustained injuries in order to

[7] In her post-hearing brief, Claimant argues: "In the 'absence of substantial evidence to the contrary, it is presumed under § 20(b) [of the Longshore Act] that the employer has been given sufficient notice' of the claim pursuant to § 12 of the Act. Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989). 'Where one injury arises out of an accident that has been reported, the Claimant does not have to give separate notice of the injuries resulting from the same incident.' Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94 (1988)." As Employer offered no argument in their brief, and no evidence to the contrary, it is found that the claims set forth by Claimant regarding all of her injuries were timely filed. Claimant also contended, for the first time and with no supporting evidence or argument, that Employer did not timely controvert coverage of Claimant's headaches and psychiatric injuries. Allegations made only in post hearing briefs, with no supporting evidence or arguments will not be considered.

invoke the causal presumption.

The term "injury" means accidental injury arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. *See* 33 U.S.C. § 902(2); *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. at 615, *rev'g, Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to section 2(2) of the Act. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom., Gardner v. Director, OWCP*, 640 F. 2d 1385 (1st Cir. 1981); *Preziosi v. Controlled Industries*, 22 BRBS 468 (1989); *Janusziewicz v. Sun Shipbuilding and Dry Dock Co.*, 22 BRBS 376 (1989) (decision and order on remand); *Johnson v. Ingalls Shipbuilding*, 22 BRBS 160 (1989); *Madrid v. Coast Marine Construction*, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause or primary factor in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Care v. WMATA*, 21 BRBS 248 (1988).

a. Hearing Loss

The first injury arising out of the work-related accident on August 18, 1999 alleged by Claimant is that of a hearing loss. As discussed *supra*, the parties have stipulated that Claimant suffered a hearing loss as a result of this accident, therefore, this injury will only be discussed *infra*, regarding its nature and extent. *See* (TR. at 9-10);(Stip. 3 & 6).

b. Neck Pain

The second injury arising out of the work-related accident on August 18, 1999 alleged by Claimant is that of neck pain. Claimant testified that she gets pain in her neck muscles on the right side, below her ear. (TR. at 41). She testified that this seems to be related to her ear problems, stating "[w]hen I'm having the pain that's so severe and everything, it will reach all of the muscles down to the ear, like it's sore now, because I'm having the ear problems here lately." (TR. at 42). She also testified that the pain causes her to get ill. (TR. at 42-43). In support of this contention, Claimant offers the opinion of Dr. Greenberg. In a letter dated November 11, 2000, Dr. Greenberg writes:

> [Claimant] was examined by me on September 22, 2000 and was found to be suffering from migraines which are aggravated by right cervical and periscapular muscle spasms. The muscle spasms are apparently a result of the accident that occurred on August 19, 1999. They occurred when [Claimant] was subject to an unexpected loud noise which caused her to reflexively jerk her head, causing a whiplash type reaction.

(CX 1F at 13);(EX 5-7). *See also* (CX 1F at 7)(Dr. Greenberg's office note from this date). In a second letter dated November 29, 2000, Dr. Greenberg writes:

> [Claimant] is being seen in this office for neurologic evaluation of headaches and neck pain. These symptoms apparently originated from an incident that occurred while she was working on August 19, 1999.

(CX 1F at 17);(EX 5-11). In addition, Claimant has undergone physical therapy and trigger point injections for this pain. (CX1F at 18-19). This evidence is sufficient to prove that Claimant suffers an injury in her neck. Therefore, the presumption is invoked and it is presumed that Claimant's neck pain was caused by her August 18, 1999 accident.

c. Head Pain

The third injury arising out of the work-related accident on August 18, 1999, alleged by Claimant is that of "head pain." Claimant testified that her head pains are severe, on the right side, "right in [her] temple where it's always been since the day one to the accident." (TR. at 40). *See also supra* note1(Claimant's explanation as to why she uses the term "head pain."); (CX 1K at 29-30, 36) (emergency room report on "acute cephalgia," or headache dated October 16, 2001). The letters of Dr. Greenberg, quoted *supra*, support Claimant's testimony. (CX 1F at 13);(EX 5-7); (CX 1F at 17);(EX 5-11). Further, Employer authorized the treatment of headaches until the date on which Dr. Leone broke the connection between the accident and the headaches. (EX 4 at 3-5);(EX 8 at 13-16). It is undisputed that Claimant has suffered from headaches since the accident, and Dr. Greenberg has stated that Claimant's continuing right-side headaches are related to her accident. (CX 1F at 13). Further, Employer has admitted that the headaches suffered by Claimant prior to December 13, 1999 were work related. (Emp. Br. at 29). *See also* (CX 1E at 3-7);(EX4 at 2-5). Claimant has proved an injury and therefore Section 20(a) presumption of causation is invoked and it is presumed that all of Claimant's headaches were caused by her August 18, 1999 accident.

d. Psychiatric Injury

Finally, Claimant alleges that she suffers psychiatric injuries due to the work-related accident on August 18, 1999. In the alternative, Claimant may prove that her work-related accident and resultant medications aggravated or combined with a pre-existing condition to result in disability. In support of this allegation, Claimant testified that one of the medicines prescribed by Dr. Leone "brought her down real bad" and "made [her] very depressed." (TR. at 46-49). It is undisputed that Claimant attempted suicide on March 10, 2000, and reported to an emergency room for an anxiety attack on May 25, 2000. (CX 1J at 11); (CX 1K at 16, 17);(CX 1K at 3). She attributed her suicide attempt and anxiety attacks to her injury, medications, and pending workers' compensation claim. (TR. at 57, 59, 61, 93).

Claimant's allegation that her psychiatric problems were at least in part caused by her work-related accident is supported by a letter written by Dr. Timothy Sapp, dated December 7, 2001. (CX 1H at 52). In that letter, Dr. Sapp noted that when he began seeing Claimant, in September of 2000, she described herself as **"**having had severe depressive and anxiety related symptoms following an injury that had occurred at a previous job approximately 1 (one) year prior. Apparently this injury had damaged her hearing and made it difficult for her to pursue work

secondary to problems resulting from the injury." (*Id*.). In addition he opined " [Claimant's] symptoms did seem to be directly related to the injury and the circumstances that followed." (*Id*.).

Based upon this evidence, Claimant has proved a psychiatric injury. Therefore, it is presumed pursuant to the Section 20(a) presumption that Claimant's work related accident of August 18, 1999 caused, contributed to or aggravated her psychiatric condition.

In sum, Claimant has successfully invoked the Section 20(a) causal presumption regarding her hearing loss, neck pain, headaches, and psychiatric injuries. The Employer now bears the burden of rebutting that presumption.

Rebuttal

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transport Co., v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996). The Eleventh Circuit has held that in order to rebut the presumption once invoked, an employer must introduce evidence "ruling out the possibility" of a causal connection. *See Brown v. Jacksonville Shipyards Inc*., 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990)

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by § 20(a). *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's condition was not caused or aggravated by her employment. *Rajotte v. Genera Dynamics Corp.*, 18 BRBS 85 (1986).

a. Hearing Loss

As discussed *supra*, Claimant's hearing loss has been stipulated to and will be discussed *infra* regarding the nature and extent of that injury.

b. Neck Pain

Employer relies on the testimony of Dr. Leone in order to rule out Claimant's work related accident as the cause of her neck pain. Dr. Leone treated Claimant from September of 1999 through March of 2000. During that time, the doctor's examinations of her neck were normal and Claimant made no complaint of neck pain. *See* (EX 8 at 8-9; 13; 14; 16). Dr. Leone testified that if Claimant's neck pain was a result of the accident on August 18, 1999, he would have expected her to make some sort of complaint of neck pain during his visits with her. (EX 8 at 16). Dr. Leone testified in his deposition that he could "not in any way" relate Claimant's neck

pain because there was no temporal relationship. (EX 8 at 22). Therefore, as it is not noted that Claimant complained of or showed symptoms of neck pain prior to the fall of 2000, Dr. Leone concluded that there was no way that the neck pain complained of was related to Claimant's August 1999 work accident. (*Id*). *See generally* (EX 4)(office notes of Dr. Leone). This unequivocal testimony and supporting records and office notes are sufficient to rule out causation and rebut the presumption.

c. "Head Pain"after December 13, 1999

Employer argues that, although some of Claimant's headaches were work related, those headaches resolved as of her December 13, 1999 visit with Dr. Leone. At that time Claimant was on Buspar, a headache medication, that resolved her right-side headaches. (CX1E at 6); (EX 4 at 4). When she returned, on January 27, 2000, with a severe headache, Dr. Leone stated that it was a "migraine without aura" and not related to her accident. (CX1E at 7); (EX 4 at 5);(EX 8 at 15). Further, Dr. Leone stated that it would be unusual for Claimant's right side headaches, complained of on her March 6, 2000 visit, to be related to her accident due to the length of time after the incident. (EX 8 at 17).

In addition, Dr. Greenberg's impressions of Claimant as of his first visit with her, September 22, 2000, were in agreement with Dr. Leone's. In fact, he wrote "I agree with Dr. Leone's assessment." (CX 1F at 7). On February 1, 2001, Claimant returned to Dr. Greenberg and he stated: "I have tried to explain to both the patient and the case manager that this patient has both her myofascial pain related to the injury and a history of migraine. These problems will tend to exacerbate each other and they are not wholly separable, but all of her headaches at this point do not simply relate to her injury." (*Id*. at 21). On October 25, 2001, Claimant returned to Dr. Greenberg. His recommendations at this point were as follows: "I had a discussion with the patient that it seems very counter-productive at this point to start assessing blame for why she has the headaches. I explained to her that migrainous headaches can return and that once the pattern had started, she is likely to get recurrences. The fact that she never had them before the accident, really doesn't change things." (*Id*. at 23-24). Finally, Claimant saw Dr. Balsley on April 7, 2000. At that time his diagnosis included "possible migraine headaches although the history is somewhat disjointed." (CX1D at 8).

Based upon Dr. Leone's testimony and records taken as a whole, I find that Employer has rebutted the presumption concerning Claimant's headaches after December 13, 1999. *See O'Kelley v. Dept. of the Army/ NAF*, 34 BRBS 39 (2000)(holding that an ALJ must consider the totality of a doctor's reports and testimony in determining whether or not his opinion is unequivocal). Further, both Dr. Greenberg and Dr. Balsley agree that Claimant suffers from migraines, which supports Dr. Leone's opinion.

d. Psychiatric Injury

Employer relies on Claimant's history of psychiatric care, stressful personal and familial problems, and the neuropsycholgical evaluation by Drs. Teichner and Wagner to rebut the presumption of a causal relationship between her psychological problems and her work-related accident. Claimant has been hospitalized for psychiatric problems previously. (TR. at 113-14). In addition, she acknowledged personal stressors in her life. (*Id*. at 113; 120-22; 130-32). Finally, Drs. Teichner and Wagner opined that Claimant's current psychiatric problems were not

an aggravation to preexisting psychiatric problems. They opined: " Loss of income, situational stress, frustration about future employment and pending litigation are stressors. Her reaction to these stressors is not significantly different than would be expected from any other person." (EX 7 at 6). Further, the doctors directly and unequivocally stated that Claimant's current psychiatric problems were not directly related to her August of 1999 accident. They wrote: "The patient was able to work from the time of the incident until being terminated secondary to behavioral problems in June, 2000. Over that period she was able to hold two jobs. Thus, it is unlikely that current psychiatric problems are directly related to this incident." (EX 7 at 6). Based upon all of these factors, I find that Employer has successfully rebutted the presumption of causation, aggravation and/or contribution of Claimant's psychiatric injuries and her work accident.

Weighing the Evidence

Once the presumption of causation has been successfully rebutted, "the presumption no longer controls and the issue of causation must be resolved based on the evidence as a whole." *Devine v. Atlantic Container Lines, G.I.E.*, 25 BRBS 16, 20-21 (1990). This is what is commonly referred to as the "bursting bubble" theory of the Section 20 (a) presumption. *Brennan v. Bethlehem Steel Corp.*, 7 BRBS 947 (1978). Therefore, Claimant must show by a preponderance of the evidence that the alleged injury or aggravation of injury is causally related to her employment with Employer. In attempting to meet this burden, Claimant is not entitled to the so-called "benefit of the doubt rule." *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994). In the instant case, Claimant has proven her prima facie case, invoking the presumption, as to her hearing loss, neck injury, head pain, and psychological injuries. Employer rebutted that presumption as to Claimant's neck injury, head pain and psychological injuries. Therefore, the evidence must be weighed as a whole for those three injuries.

a. Neck Injury

It is clear that Claimant suffers neck pain. Dr. Greenberg opines that this neck pain is a result of her accident, a "whiplash type reaction." (CX 1F at 13). He states that Claimant's muscle spasms are "apparently" the result of her accident. (*Id*.). Additionally, during Claimant's initial visit, Dr. Greenberg expressed skepticism regarding Claimant's explanation of her neck pain, that "it is because she has to turn her head to hear with her left ear." (*Id*. at 7). However, Dr. Leone unequivocally opined that Claimant's neck pain could not be related to her accident, due to the year long time period in which there were no abnormal examinations of Claimant's neck and she did not complain of neck pain. (EX 8 at 8-9; 13-14; 16). *See generally* (EX 4)(Dr. Leone's office notes). Therefore, there was no temporal relationship between Claimant's neck pain and her accident and the pain could not be related to her accident. (EX 8 at 22). Dr. Greenberg offered no explanation as to why Claimant's "whiplash type" neck injury did not manifest until a year after the accident nor any opinions or office notes regarding the reasoning behind his conclusion. Therefore, I find that, based on Dr. Leone's unequivocal opinion, the length of time between Claimant's first complaint of neck pain and her accident, in addition to the normal examinations and x-rays of her neck prior to that first complaint, Claimant's neck injury was not caused by her August 18, 1999 accident.

b. "Head pain"

It is undisputed that Claimant's headaches through December 13, 1999 were related to her August 18, 1999 accident. Those headaches resolved due to the medication Buspar. (CX 1E at 6); (EX 4 at 4). Over a month and a half later, on January 27, 2000, Claimant returned complaining of a severe headache, vomiting and nausea. (CX 1E at 7); (EX 4 at 5). At this time, Dr. Leone affirmatively stated that her episode was not related to her work-related accident. (*Id*.). He diagnosed her with a "migraine without aura." (*Id*.). When asked: "Can you say with any reasonable degree of medical certainty that the headaches [Claimant] was experiencing on 03-06-00 were related to her work injury she had in August of 1999?," Dr. Leone replied: "I don't know. It would be unusual for her to have headaches in March of 2000, after a period of resolution of the headaches, for them to be related to the incident in August of 1999...That's, I think, the best way for me to word that... Because it was the same type of headache in a milder form." (EX 8 at 17). He agreed, however, that when he saw her in January of 2000, he did not think her problems at that point were related to the accident. (*Id*.). Claimant also saw Dr. Balsley for her headaches. He identified those headaches as "possible migraine headaches, although the history is somewhat disjointed" and of "questionable etiology." (CX 1D at 8); (CX 1D at 10).

Claimant also saw Dr. Greenberg for her headaches. His initial impression was that Claimant suffered migraines without aura, agreeing with Dr. Leone's diagnosis. (CX 1F at 7). In Dr. Greenberg's November 11, 2000 letter, he states:

> [Claimant] was examined by me on September 22, 2000 and was found to be suffering from migraines which are aggravated by right cervical and periscapular muscle spasms. The muscle spasms are apparently a result of the accident that occurred on August 19, 1999.

(CX 1F at 13);(EX 5-7). As discussed *supra*, Claimant's neck pain and muscle spasms are not found to be related to her accident, therefore, their contribution to or aggravation of her migraines is not relevant. In his November 17, 2000 letter, Dr. Greenberg refers to both Claimant's headaches and her neck pain and states: "These symptoms apparently originated from an incident that occurred while she was working on August 19 [sic 18], 1999." (CX 1F at 17); (EX 5 at 11). Dr. Greenberg's only other comments regarding causation include: "...all of her headaches at this point do not simply relate to her injury," and " migrainous headaches can return and that once the pattern had started, she is likely to get recurrences. The fact that she never had them before the accident really doesn't change things." (CX 1F at 21)(note dated February 8, 2001); (CX 1F at 23-24)(note dated October 25, 2001).

As discussed *supra*, once the presumption is rebutted it falls from the case and Claimant bears the burden of proving by a preponderance of the evidence that her injury was caused by her work-related accident. In the instant case Claimant has not carried that burden. No doctor affirmatively and unequivocally relates Claimant's headaches to her accident once her neck pain is taken out of the analysis. Therefore, I find that Claimant's headaches after December 13, 1999, are not related to her August 18, 1999 accident.

c. Psychiatric Injuries

It is undisputed that Claimant suffers from psychological injuries and has undergone numerous treatments for those injuries. Claimant testified that she was not seeing any kind of counselor or psychiatrist prior to her injury. (TR. at 139). Treatments have included a

emergency room visits for anxiety attacks and a suicide attempt, in addition to follow-up care. Additionally, Claimant admits that she previously underwent treatment for psychological problems at the age of 14. (TR. at 113-14). However, Claimant testified that prior to her accident she was able to hold down a job. (TR. at 142). Claimant has also admitted familial stress. (TR. at 130-32). Finally, Claimant testified that she had a turbulent relationship with her boyfriend, Mr. Howell. (TR. at 112-13).

Claimant testified that she cut her wrists "[b]ecause [she] got tired of everything." (TR. at 57). She testified: "I was losing everything and I figured everybody was ganging up on me and nobody wanted to listen to what I've got to say and I think anybody didn't care and I just – I just wanted to just give up." (*Id*.). In addition, Claimant stated that she felt like everything was "falling apart" and the medications was on were "making [her] down and depressed." (TR. at 56). Admittedly Claimant used alcohol within the 24 hours before her suicide attempt. (TR. at 100). Testing also revealed THC, or marijuana in her system. Claimant also testified that at least one contributory factor in her depression and suicide attempt was that things were getting repossessed, although she later admitted that she was still on full salary at Intermarine. (TR. at 49, 101). She testified, however, that she was not working as much at Waffle House or Intermarine because she would be sick or seeing doctors. (TR. at101). Claimant has given varying accounts as to how much she was making at Waffle House. (TR. at 101-103)(stating that she made "way more" than $40 in tips, however testifying in her deposition that the $40 included tips). She further testified that when she has attacks of anxiety or depression her workers' compensation case, the medications and the doctors are what she is thinking about. (TR. at 92-93). After being released, Claimant returned to Dr. Sapp due to anxiety attacks as the trial was approaching. (TR. at 129).

As discussed *supra*, Employer submitted the neuropsychological evaluation by Drs. Teichner and Wagner which unequivocally opines that Claimant's accident of August 18, 1999 did not cause nor aggravate a preexisting psychological injury. (EX 7 at 6). In their discussion, the doctors wrote:

> The patient presents with significant symptoms of depression and anxiety. She has a maladaptive personality style characterized by an unstable self image, impulsivity, substance abuse, affective instability, intense anger, and transient stress related. As per her report, situational factors (i.e., financial stress, discord with her boyfriend, worker's compensation case, litigation, problems with her children) have exacerbated her psychiatric symptoms.

(EX 7 at 5). That report garners additional credibility due to the "Test of Malingering" which indicated that Claimant was putting forth "adequate effort" throughout the testing. (EX 7 at 4).

The situational factors set forth by both Claimant for her depression and anxiety which are work-related include the workers' compensation case and her medications. As it has been found that Claimant's headaches and neck pain are not related to her accident, however, the effects of any medications that she is taking for those injuries and frustrations with her doctors, while understandable, are not relevant to the compensability of her psychiatric condition in this forum. Further, the stress Claimant has experienced over her workers' compensation claim, while also understandable, is also not compensable. The Board has held that a psychological injury resulting

from a legitimate personnel action is not compensable under the LHWCA because to hold otherwise would unfairly hinder an employer in making legitimate personnel decisions and in conducting its business. *Marino v. Navy Exchange*, 20 BRBS 166, 168 (1988); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996). The contesting of compensability of an injury and treatment is certainly a justified legitimate personnel action which employers must make in order to conduct their business. Additionally, as discussed *infra*, it is undisputed that Claimant's termination from her position with Employer was also a legitimate personnel decision.

Therefore, based upon the credible and reliable report of Drs. Teichner and Wagner, along with the fact that the situational factors causing Claimant anxiety and depression are either legitimate personnel actions of Employer, personal, or related to what have been found to be non-compensable headaches, I find that Claimant has not proven that her psychological problems are related to her accident of August 18, 1999.

Nature and Extent of Injury

The burden of proving the nature and extent of disability rests with Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and her inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968)(per curium), *cert. denied*, 394 U.S. 876 (1969). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). If a physician does not specify the exact date of maximum medical improvement a judge may use the date the physician rated the extent of the injured worker's permanent impairment. *Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988). Therefore, in the instant case Claimant's hearing loss became permanent when Dr. Logan assigned a rating, January 12, 2001.

Temporary Disability

It is undisputed that Claimant is entitled to temporary total disability for the time immediately following her accident. Pursuant to the Act, Claimant is entitled to 66 and 2/3% of the average weekly wages during this time. 33 U.S.C. § 908(b). Claimant was out of work entirely from August 19, 1999 through September 22, 1999. (TR. at 15); (Stip. 8). Employer

paid claimant benefits in the amount of $1,027.41. (*Id.*). Claimant was paid on an hourly basis at the rate of $8.03 an hour. (CX 10 at 1); (TR. at 108). It was stipulated that Claimant's average weekly wage at the time of injury was $300.62, resulting in a compensation rate of $217.94 per week. (Stip. 4). Claimant is entitled to $217.94 (compensation rate) X 5.4 weeks (27 days) = $1,176.88. Therefore, Employer must pay the difference between $1,027.41 and $1,176.88, a total of $149.47.

Claimant also alleges that she is entitled to additional temporary partial disability benefits as she was unable to work for a total of 296.5 hours after returning to work, September 22, 1999 through May 12, 2000. (Cl. Br. at 5). This claim is based upon a printout of hours missed from "Donna" from human resources. (TR. at 36); (CX 11). Claimant testified that these were the days she missed work from being sick and from going to doctor's appointments. (TR. at 34). Claimant stated that she was not paid for this time, that she had to use vacation time and her boss told her she did not get paid when on vacation. (TR. at 104). However immediately thereafter, she testified that for the hours presented to the court she did not use vacation time. (TR. at 104-05). She did not use sick leave. (TR. at 105). She stated that she knew she wasn't paid for this time because that was the time that Donna presented to her. (*Id.*). She did not ask about pay lost, just hours missed. (*Id.*). The statement is not signed by anyone at the company. (CX 11). Employer then stated that it was their understanding that Claimant used sick leave or vacation time for these hours missed and therefore did not actually lose any money. (TR. at 106). Employer then requested the opportunity to submit pay records for these times post-hearing. The request was granted, however, no such records were submitted. Claimant was paid on an hourly basis and was not paid a straight salary. (TR. at 108).

Claimant's testimony regarding whether or not she used vacation time for these days was equivocal, however, she stated that she did not receive pay for vacation time. Therefore, such equivocation is irrelevant, as her unequivocal testimony was that she was that she did not work during those hours, and whether she took vacation time or not, she was not paid. In addition, Employer has submitted no evidence to contradict this testimony or exhibit. Therefore, based upon my previous finding that Claimant's headaches relating to her injury resolved as of December 13, 1999, she will be compensated for the hours missed prior to that date. According to CX 11, that amounts to 87.5 hours missed. In addition, comparing the dates of Dr. Logan's appointments and CX 11, the time missed on the following dates listed on CX 11 are also found compensable: April 6, 2000; April 19, 2000; May 1, 2000; May 10, 2000. Pursuant to CX 11, this results in an additional 18.5 compensable hours. Therefore Claimant is entitled to $851.18 (106 hours x $8.03) x 66 2/3 % = $567.45.

Permanent Disability

The question of extent of disability is an economic as well as a medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, the claimant must show that she is unable to return to her regular or usual employment due to her work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of disability may constitute a sufficient basis for an award of compensation. *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451, 454 (1978); *Eller & Co. v. Golden*, 620 F.2d

71, 12 BRBS 348 (5th Cir. 1980). In addition, claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78, (5th Cir. 1991). Again, in the instant case, the only injury found to be compensable is that of Claimant's hearing loss and her headaches before December 13, 1999.

Hearing Loss

As discussed *supra*, it is undisputed that Claimant experienced a permanent hearing loss that was work-related. *See* (Stip. 3 & 6). *See also* (EX 1 at 6)(CX 1B at 11)(Dr. Logan's notes establishing a causal connection between the accident and Claimant's hearing loss). *See generally* (CX 1B)(EX 1) (Dr. Logan's office notes and correspondence). On July 17, 2000, Dr. Logan scheduled Claimant for a hearing aid evaluation. (EX 1 at 28). On October 2, 2000, Claimant was fitted for a hearing aid. (EX 1 at 30). Claimant was assigned a permanent disability rating of 18.4% by Dr. Logan on January 12, 2001. (EX 1 at 32);(CX 1B at 46). *See also supra* note 4. Employer paid this rating to Claimant on January 10, 2002. (Stip. 7). Based upon all of these uncontested facts, I find that Claimant did suffer an 18.4% permanent hearing loss in the right ear as a result of her August 18, 1999 work related accident. I also find that the parties have agreed that Employer has paid the appropriate rating. Employer is also responsible for all medical benefits related to this injury including hearing aids, treatment for her ear bleeding, tinnitus and vertigo.

The work restrictions in place for Claimant's hearing loss and her head injury which resolved December 13, 1999 are the only work restrictions to be considered. In a work excuse dated May 1, 2000, Dr. Logan put Claimant on light for 2 weeks with no exposure to loud noise or intense pressure changes. (CX 1B at 19; 28). Dr. Logan continued this light duty restriction indefinitely in a note dated May of 2000.[8] (CX 1B at 33). In a "Certificate for return to school or work" dated March 15, 2001, Dr. Logan stated that Claimant was able to be at work but must refrain from a noisy environment. He states "see report 6/8/00." It is noted that no report signed or dictated by Dr. Logan dated June 8, 2000 appears in the record submitted to the Court. However, in Dr. Logan's note dated May 1, 2000, Dr. Logan issued the restrictions set forth *supra*, and those are the restrictions this Court will consider in place during this time period. In Employer's labor market survey it states that : "On 3/15/01 Dr. Logan reported to them that the restrictions he reported on 6/8/00 are still in effect – that Client refrain from working heights and that she refrain from working in a noisy environment." (EX 6 at 1). When asked by the vocational expert to clarify the "noisy environment restriction, Dr. Logan replied that Claimant should work in an environment that has a noise level of 'moderate'[9] (as classified by the U.S. Department of Labor) or less." (EX 6 at 1, 14). Based upon this evidence, the Court finds that Claimant's restrictions include no exposure to noise levels exceeding "moderate," as defined by the Department of Labor, and no exposure to intense pressure changes.

Suitable Alternate Employment

[8] The exact date in May that this restrictions were issued cannot be determined. The number appears to be either a 10 or a 15.

Claimant has proven that she cannot return to her regular work as a pipefitter. Therefore, the burden shifts to the employer to show suitable alternate employment exists. An employer can establish suitable alternative employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. *Walker v. Sun Shipbuilding and Dry Dock Co.*, 19 BRBS 171 (1986); *Darden v. Newport News Shipbuilding and Dry Dock Co.*, 18 BRBS 224 (1986). If, however, employer establishes suitable alternate employment by providing claimant light duty work which he successfully performs, but claimant is subsequently discharged for breaching company rules and not for reasons related to his disability, employer does not bear a renewed burden of providing other suitable alternate employment. *Brooks v. Director, OWCP*, 2 F.3d 64 (1993). *Brooks* establishes the principle that such a suitable light duty position continues to be suitable alternate employment despite the discharge. Claimant's wage-earning capacity must therefore be evaluated as if he were continuing to hold that job, and employer remains fully liable for any loss in wage-earning capacity in that job. *Mangaliman*, 30 BRBS at 41-43. Claimant must cooperate with Employer's re-employment efforts, and if Employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider Claimant's willingness to work. *Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner*, 731 F.2d 199 (4th Cir. 1984); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986).

When Claimant was released to come back to work after her August 18, 1999 accident, on September 20, 1999, she came back work with Employer. Although Claimant was released to work full duty by Dr. Danello on September 20, 2000, some of her time was spent in a light duty positions in parts and as a security guard. (TR. at 37). It is undisputed that, on June 26, 2000, Claimant was terminated "because of unacceptable behavior and presenting an unprofessional image of the company." (TR. at 114-115). She testified that the entire incident was "foggy." (TR. at 115-116). Therefore, Claimant was terminated from her position with Employer for cause. Although Claimant's counsel argues that Claimant had not been released by all of her doctors at this time, as of May of 2000, Claimant's restrictions concerning her ear were in place. As discussed *supra*, those restrictions did not change, even when Claimant's condition became permanent. *See* (EX 6)(labor market survey with the release dates and restrictions of all Claimant's physicians listed). Therefore, although Claimant's hearing loss did not become permanent until January 12, 2001, it became partial on the date that she returned to work in a suitable position. There has been no evidence or argument that Claimant's position with Employer exceeded her restrictions at any time. Neither party has argued that her last position with Employer was unsuitable or that it did not constitute suitable alternate employment regarding her hearing loss.

In *Brooks*, the Court cited the Board's holding that "claimant's inability to perform the post-injury job at employer's facility on or after [the date of termination] was due to his own misfeasance in violating a company rule, any loss in his wage-earning capacity thereafter is not compensable under the Act inasmuch it is not due to claimant's disability resulting from the work-related incident." (*Id*. at 66.). In the instant case, as in *Brooks*, it is undisputed that Claimant was terminated for violating a company rule while she was in a suitable position. Therefore, Claimant is not entitled to compensation for any wage-earning loss after June 26, 2000. Although Employer has also submitted a labor market survey (EX 6), it is not necessary to analyze it, as Claimant's relevant restrictions did not change subsequent to her discharge and the position Claimant had with Employer is sufficient to show suitable alternate employment.

Medical Benefits

Where a claimant has demonstrated that she has suffered from a compensable injury under the LHWCA, the employer is required to furnish medical, surgical and other attendant benefits and treatment for as long as the nature of the recovery process requires. 33 U.S.C. § 907. The claimant must establish that medical expenses are related to the compensable injury and are reasonable and necessary. *Pardee v. Army Force Exchange Service*, 3 BRBS 1130 (1981); *Pernell v. Capital Hill Masonry*, 11 BRBS 532, 539 (1979). The medical expenses are assessable against the employer so long as they are related to the compensable injury. *See Pardee, supra.* The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. For example, an employer must pay for the treatment of the claimant's myocardial infarction, if the judge finds that it is causally related to a prior work-related injury. *Atlantic Marine v. Bruce*, 661 F.2d 898 (5th Cir. 1981), *aff'g* 12 BRBS 65 (1980). Any injury sustained during the course of a medical examination scheduled at the employer's request for an alleged work-related injury is covered under the LHWCA, because such an injury necessarily arises out of and in the course of employment. *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146, 148 (1986). A doctor's treatment of a claimant does not constitute an intervening cause as there is no evidence on his part of either intentional misconduct or negligent conduct unrelated to the claimant's primary injury. *Wheeler v. Interocean Stevedoring*, 21 BRBS 33 (1988). (Improper, unauthorized medical treatment is not reimbursable). Further, the LHWCA's liberal concept of causation is applied to subsequent injuries as well as to initial ones. *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'g* 12 BRBS 65 (1980).

Treatment is compensable even though it is due only partly for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 258 (1984). In *Kelley v. Bureau of National Affairs*, 20 BRBS 169,172 (1988), the Board held that where relevant evidence established that the claimant's psychiatric condition was occasioned, at least in part, by her work injury, treatment received by the claimant for this condition was compensable under the LHWCA.

The employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. *Slattery Assocs. V. Lloyd*, 725 F.2d 780, 787 (D.C. Cir. 1984). Failure to obtain authorization for a change can be excused, however, where the claimant has been effectively refused further medical treatment. *Lloyd*, 725 F.2d at 787; *Washington v. Cooper Stevedoring Co.*, 3 BRBS 474 (1976), *aff'd*, 556 F.2d 268 (5th Cir. 1977). The employer bears the burden of establishing that physicians who treated an injured worker were not authorized to provide treatment under the Act. *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). In the instant case it is undisputed that Employer has paid for all authorized treatments. The disputed treatments and medications have been not been found compensable. Therefore, Claimant is entitled to medical benefits only as to her hearing loss, hearing aids, right ear bleeding, vertigo, tinnitus, and as to headaches prior to December 13, 1999.

Mileage

Claimant alleges that she was not paid in full for the mileage related to her medical treatments. (Cl. Br. at 6). Claimant submitted a statement itemizing the dates and mileage

between Claimant's residence at Gerard Avenue, in Richmond Hills and the medical facility. (CX 3). She testified that the distance was accurate. (TR. at 80);(CX 3). Claimant also admitted, however, that she had been compensated for milage. (TR. at 97). When asked: "I'm talking about the mileage statement your lawyer showed you. Is it your testimony here to this Judge that you have not been paid for any of that mileage?" She replied "I have been paid." (TR. at 98). She also testified that she did not know the exact figure she had been paid. (TR. at 138). She testified: "Well,, just for the – I've been exactly paying for all the doctors, but the only thing I have not been paid for is coming back into town and everything for the –picking up my –," at that point counsel interrupted and asked if she knew the amount of money she'd been paid for mileage. She said no. (*Id*.). It is Claimant's burden to establish the mileage due her as a direct result of her accident. Given Claimant's testimony that she had been reimbursed for mileage and her inability to state the amount that she had been paid, or what was due, her lack of evidence regarding the same, and the previous findings that not all of Claimant's injuries and treatments are compensable, I find that Claimant has not proven that she is entitled to additional mileage compensation.

Order

Accordingly, it is hereby ordered that:

1. Employer, Intermarine USA, is hereby ordered to pay to Claimant, Karleshia A. Ortiz, permanent partial disability pursuant to the schedule for the 18.4% hearing loss to her right ear, in the amount of $8,020.19;

2. Employer is hereby ordered to pay Claimant temporary total disability for the dates August 19, 1999 through September 22, 1999 in the amount of $149.47, the difference between what they have already paid and what is due Claimant pursuant to Section 908(b);

3. Employer is hereby ordered to pay Claimant temporary partial disability for the hours missed for appointments to see Dr. Logan, in the amount of $567.45;

4. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injury, including hearing aides, treatment for right ear bleeding, tinnitus and vertigo;

5. Employer shall receive credit for any compensation already paid;

6. Interest at the rate specified in 28 U.S.C.§ 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

7. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/vrh
Newport News, Virginia